

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

BRENDA BARTHOLOMEW,

Plaintiff and Respondent,

v.

MARILYN BARTHOLOMEW,

Defendant and Appellant.

A145018

(Alameda County  
Super. Ct. No. RP08-420233)

ORDER MODIFYING OPINION  
AND DENYING REHEARING

NO CHANGE IN JUDGMENT

BY THE COURT:

The court orders that the opinion filed herein on October 12, 2016, be modified as follows:

In the paragraph starting on page 2 and ending on page 3, the first sentence of the paragraph shall be deleted and replaced with the following: “Brenda filed an accounting of the trust on October 11, 2012, and an amended accounting on January 31, 2013. Marilyn filed objections to these accountings on November 16, 2012 and February 20, 2013. The trial date for the hearing for consideration of the final account of the trust and any objections thereto was set for September 29, 2014.”

There is no change in judgment.

Appellant’s petition for rehearing is denied.

Dated:

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Margulies, Acting P.J.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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BRENDA BARTHOLOMEW, as Trustee,  
etc.

Plaintiff and Respondent,

v.

MARILYN BARTHOLOMEW,  
Defendant and Appellant.

A145018

(Alameda County  
Super. Ct. No. RP08-420233)

**INTRODUCTION**

Marilyn Bartholomew,<sup>1</sup> the beneficiary of a revocable trust, appeals from an order following trial which approved the final account of a trustee. Representing herself in propria persona, Marilyn argues the trial court erroneously excluded certain evidence, relied on the legal conclusions of experts, failed to give her proper notice of the issues to be decided at trial, and failed to resolve all issues raised in her pleading. We find these contentions unavailing and affirm.

**BACKGROUND**

Regina and Bertram Bartholomew executed a declaration of revocable trust dated September 1, 1993 (the Trust) naming themselves as trustees. The beneficiaries named in the trust are Bertram's three children, Brenda Bartholomew, Raymond Bartholomew, and Marilyn Bartholomew, as well as his four grandchildren. The children are to each receive

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<sup>1</sup> Because many of the parties and individuals in this case share the same last name, we refer to them by their first name. We mean no disrespect in doing so.

20 percent of the trust assets, and the grandchildren are each to receive 10 percent.

Regina and Bertram also executed a pourover will that provides for any property not held in trust to be distributed into the Trust after their deaths. The Trust was subsequently amended on March 27, 2000. Regina died on January 9, 2000, and Bertram died April 9, 2009. Upon Bertram's death, Brenda and Raymond became cotrustees.

Prior to his death, Bertram operated a realty business, Bert Realty and Investment Company (Bert Realty). In exchange for a fee, Bert Realty would collect rent, oversee the properties, coordinate repairs with contractors, and manage maintenance work. From 1997 until his death in 2009, Bertram employed Brenda as the business manager. After Bertram's death, Raymond began a new business, Bert's Realty, and hired Brenda as the business manager. Bert's Realty retained many of the Bert Realty's former clients. After Brenda obtained her broker's license, she replaced Raymond as broker for Bert's Realty.

In 2011, Marilyn filed a "First Amended Objection to the Accounting and for Surcharge." Among other things, the objection sought an account of the assets in Bert's Realty, and a surcharge against Brenda and Raymond based on self-dealing in operating Bert's Realty on Trust property.

A trial was held on the matter, and the court entered a statement of decision on November 30, 2011. The trial court concluded Brenda and Raymond's failure to treat Bert's Realty as an asset of the Trust was a breach of their duties of loyalty and impartiality, and violated their responsibility to avoid self-dealing. The court determined the portion of the net income from Bert's Realty that belonged to the Trust as follows. First, the court determined for each year the excess of income over expenses. Second, expenses were apportioned between income attributable to former clients of Bert Realty and new clients of Bert's Realty—the former being Trust property and the latter being the separate property of Raymond and Brenda. Finally, "taking the excess income attributable to former clients, it is reduced by compensation to Raymond/Brenda calculated as a percentage of the excess income amount."

On July 10, 2012, Marilyn filed a petition pursuant to Probate Code section 17200, objecting to various aspects of Brenda's account of the Trust. In her pretrial brief,

Brenda requested her account of the Trust be accepted as the final account. A trial was held at which Marilyn represented herself in propria persona. On March 2, 2015, the trial court issued an “order approving the ‘final’ accounting of the trustee and ordering payment of a surcharge by the trustee.” The order, which amounted to a statement of decision, resolved all of Marilyn’s objections to the accounting. The court surcharged Brenda \$15,050, the fair market value of the business belonging to the Trust. Other than the surcharge, Brenda’s accounting was confirmed and settled as the final account of the Trust.

Marilyn subsequently moved for a new trial. The motion was dropped by the trial court.

### **DISCUSSION**

Marilyn appears to raise four arguments on appeal: (1) the trial court erred in excluding her expert’s report, (2) the trial court erroneously directed the expert witnesses to reach legal conclusions, (3) Marilyn was not given fair notice of the issues to be decided at trial, and (4) the trial court failed to render findings on material issues raised in her petition.<sup>2,3</sup> All of these contentions are meritless.

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<sup>2</sup> In her statement of facts, Marilyn also asserts that the trial court interrupted her opening statement and presentation of evidence by “quizzing” her and posing questions to her witnesses. However, Marilyn does not discuss these interruptions in her argument section, or otherwise explain why they warrant reversal. To the extent this issue has been properly raised, we find no error. The trial court was merely attempting to steer a pro. per. litigant away from irrelevant issues. It had the power and the discretion to do so. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967 [trial court has inherent power to “exercise reasonable control over all proceedings connected with pending litigation . . . in order to insure the orderly administration of justice”].) More importantly, there is no indication the trial court prevented Marilyn from presenting evidence or argument at trial.

<sup>3</sup> Any new arguments raised in Marilyn’s reply brief have been waived. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764–765 [“ ‘an appellant should, under the rules, make the points on which [s]he relies in [her] opening brief, and not reserve them for [her] reply, and . . . the court may properly consider them as waived unless so made.’ ”].)

**A. *The Expert Report Was Properly Excluded***

At trial, Marilyn called Gary Allen, a certified business appraiser, to testify concerning the fair market value of Bert's Realty. Marilyn attempted to introduce into evidence a business study and appraisal of Bert's Realty prepared by Allen. Brenda objected to the report as hearsay. The trial court sustained the objection but allowed Allen to refer to his report in his testimony.

Marilyn now argues the trial court's refusal to admit the report was unjustified and resulted in a due process violation. We cannot agree. Allen's report constitutes inadmissible hearsay, since it is a statement made other than by the witness while testifying, and it was offered to prove the truth of the matter asserted. (Evid. Code, § 1200.) In fact, in her briefing, Marilyn suggests she wanted to introduce the report to prove Allen's analysis of Bert's Realty was correct. This would have been improper. As the trial court held, Allen could testify to the contents of the report at trial, but the report itself could not be admitted into evidence.

Marilyn argues the report should have been admitted because of the "obstacles to orally presenting its complex details," pointing out that she sometimes had difficulty questioning Allen and getting him to testify about various aspects of his report.<sup>4</sup> The fact that Marilyn had difficulty examining her own witness did not excuse her from the hearsay rules or any of the other rules of evidence. While Marilyn had a right to act as her own attorney, she was subject to the same rules of evidence and procedures as a licensed attorney. (*Lombardi v. Citizens Nat. etc. Bank* (1955) 137 Cal.App.2d 206, 208 (*Lombardi*).)

Marilyn also argues Allen's report should have been admitted as a business record. This argument is also meritless. The business records exception to the hearsay rule applies where (1) a writing is made in the regular course of business (2) and was made at or near the time of the act, condition, or event; so long as (3) the custodian or other

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<sup>4</sup> Marilyn also points to certain questions the trial court asked Allen, and suggests they could have been easily and more clearly answered had the court reviewed Allen's report. But it was Marilyn's responsibility to present her own case.

qualified witness testifies to its identity and the mode of its preparation; and (4) the sources of information and method and time of preparation were such as to indicate its trustworthiness. (Evid. Code, § 1271.) In this case, the report was not made in the regular course of business. To the contrary, it was prepared specifically for this litigation. Moreover, Marilyn waived this argument by failing to raise it below and by failing to present any evidence concerning the various elements of the business records exception.<sup>5</sup>

**B. *Trial Court Did Not Direct Experts to Render Legal Conclusions***

Marilyn's next argument appears to be based on a fundamental misunderstanding of both the law and the record. Marilyn asserts the trial court directed both parties' accounting experts to render legal conclusions regarding the value of Trust's assets. Marilyn does not provide any record citations, so it is unclear exactly how the trial court directed the experts to reach a legal conclusion. But it appears Marilyn is asserting the trial court erred by asking the experts to use the methodology set forth in the November 30, 2011 statement of decision to calculate the value of the trust's assets.

Assuming Marilyn's description of the record is accurate (and it is not clear that it is), we find no error. The trial court did not direct the experts to render a legal conclusion. They were merely asked to employ a methodology that was previously enunciated in a court order. While testimony concerning the value of the business may have embraced the ultimate issue to be decided by the court, that did not render it inadmissible. (Evid. Code, § 805.) To the extent anyone rendered a legal conclusion, it was the trial court. There was nothing improper about this. Indeed, it is the trial court's

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<sup>5</sup> Marilyn raises two new arguments on reply. In addition to being waived, both contentions are meritless. First, Marilyn asserts she was not allowed to be heard on the admissibility of Allen's report. But the court did not prevent her from arguing the point. As Marilyn appears to concede in her briefing, she was just unprepared to contest the issue at the time because she was unfamiliar with the law. Second, Marilyn argues the report should have been admitted pursuant to Evidence Code section 140. But this provision merely states that evidence includes "testimony" and "writings," among other things. (Evid. Code, § 140.) It does not set forth an exception to the hearsay rule.

duty to render legal conclusions. And contrary to Marilyn's suggestion, it was not unreasonable to expect the experts to have reviewed the trial court's November 30, 2011 statement of decision prior to trial, and one did not need to be a legal expert to understand that statement of decision.

In related argument, Marilyn asserts the trial court erred in concluding that only a portion of Bert's Realty constituted Trust property. Marilyn fails to explain how this was error, and we can discern no reason to second-guess the court's decision. The trial court made a sensible and fair ruling that income arising from clients acquired after Bertram's death did not belong to the Trust. Moreover, this ruling was consistent with the trial court's November 30, 2011 statement of decision, which found that only the income from the business's preexisting clients belonged to the Trust. Contrary to Marilyn's arguments, this finding was not new and she should not have been surprised by it. To the extent Marilyn was unaware of the trial court's former ruling or she did not prepare her expert in accordance with that ruling, she is still not entitled to a new trial. As discussed, “ ‘A lay[person] with resources who insists upon exercising the privilege of representing himself [or herself] must expect and receive the same treatment as if represented by an attorney—no different, no better, no worse.’ ” (*Lombardi, supra*, 137 Cal.App.2d at p. 209.)

**C. *Marilyn Had Adequate Notice of the Issues For Trial***

Marilyn argues she was not given fair notice of the issues to be decided at trial. Marilyn's arguments on this point are not the model of clarity, but they appear to be largely repetitive of the issues discussed above. Once again, Marilyn asserts she was not aware that the trial court would decide the case under the assumption that only a portion of Bert's Realty—as opposed to all of the business—belonged to the Trust. But Marilyn need only have reviewed the November 30, 2011 statement of decision, which was issued years before trial, to discover that this was how the trial court intended analyze the Trust's property. Marilyn's surprise was not due to a lack of notice, and instead appears to have been the result of her failure to adequately prepare for trial.

**D.     *No Issues Remain Unresolved***

Finally, Marilyn argues a new trial is necessary because the trial court failed to find on some material issues raised in her pleadings. Marilyn does not identify in her opening brief what particular issues remain unresolved. In her reply brief, Marilyn asserts the trial court failed to address Allen’s testimony “that the business did not terminate and that the business continued to exist under the new name it was given by Brenda.” Setting aside that we need not address new arguments raised on reply, the contention is meritless as the court’s order did in fact address this issue. Specifically, the court stated: “Objector argued at trial that the evidence presented supported the conclusion that the business had not actually been terminated, but rather was merely continued with a different name and different address. It is clear, however, that the Trustee intended to terminate the business at that point in time. There were no other assets remaining in the trust and it was appropriate at that time to dispose of that last asset.” Contrary to Marilyn’s suggestion, the fact that the trial court found against her on this issue does not mean the issue remained unresolved.

**DISPOSITION**

The trial court’s March 2, 2015 order is affirmed. Costs are awarded to Brenda Bartholomew.



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DONDERO, J.

We concur:

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MARGULIES, Acting P. J.

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BANKE, J.